

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF OKLAHOMA

FANSTEEL METALS, INC.	)	
F/K/A FMRI, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 6:22-cv-00366-JFH-GLJ
	)	
CITIGROUP, INC.; and	)	
UNION CARBIDE CORPORATION,	)	
	)	
Defendants.	)	
_____	)	

**SECOND JOINT STATUS REPORT**

The parties hereto (“Parties”), comprising the Plaintiff, Fansteel Metals, Inc. f/k/a FMRI, Inc. (“Plaintiff”), by and through its undersigned counsel, and Defendants Citigroup, Inc. (“Citigroup”) and Union Carbide Corporation (“UCC”), by and through their respective undersigned counsel, subject to each Defendants’ reservation of all defenses and procedural rights including all those under Fed. R. Civ. P 12 (b), except as to service, and subject to all other defenses they may later assert in a responsive motion or answer to Plaintiff’s Complaint, without waiver, and pursuant to this Court’s April 4, 2023 Minute Order issued by Magistrate Judge Gerald L. Jackson (Dkt. #30), respectfully submit this Joint Status Report:

1. This is a civil action pursuant to the provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. § 9601 *et seq.* (“CERCLA”), relating to the release and/or threatened release of hazardous substances from the former Fansteel, Inc. facility located at 10 Tantalum Place, Muskogee County, Muskogee, Oklahoma, as well as any area where hazardous substances that migrated from the Fansteel site have come to be located (collectively, the “Fansteel Site”).

2. This case was filed on December 14, 2022 (Dkt. #2). As indicated in the Civil Cover Sheet (Dkt. #1), this case is related to the pending case styled *Fansteel Metals, Inc. v. Muskogee City-County Port Authority, et al.*, Case No. 21-cv-102-RAW (“Underlying Case”). This separate related case was filed by Plaintiff’s undersigned counsel because Plaintiff’s lead counsel in the Underlying Case has conflicts with Citigroup and UCC.

3. Both Citigroup and UCC have waived service and Plaintiff has filed their executed Waivers of Service in this case (Dkt. # 8, 11), but have reserved all of their respective rights to assert all defenses and procedural rights including all those under Fed. R. Civ. P 12 (b), except for service as noted above, and subject to all other defenses they may later assert, without waiver.

4. By virtue of the original Joint Status Report filed the Parties on April 3, 2023 (Dkt. #29), the Court extended the time for both Citigroup and UCC to answer or file responsive pleadings to Plaintiff’s Complaint to June 1, 2023, and further ordered the Parties to submit this Second Joint Status Report by May 22, 2023 (Dkt. #30).

5. The statements made in Paragraph Nos. 6-13 below are relevant to this case and are taken nearly verbatim from the Sixth Updated Joint Status Report Regarding Settlement Discussions also being filed today in the Underlying Case. The statements by Plaintiff’s counsel in Paragraphs 6-13, as well as those in Paragraphs 14 and 15 are not contested by the Defendants for the purposes stated in this Second Joint Status Report only and are not admissions for any other purpose that would be inconsistent with Defendants’ reservation of all rights and defenses as stated above.

6. Plaintiff’s Section 113(f) claims arose on June 2, 2020, when the Bankruptcy Court for Fansteel Inc.’s 2016 bankruptcy entered the Environmental Settlement Agreement (“ESA”) that resolved claims against Fansteel and Plaintiff by the United States, on behalf of the Nuclear

Regulatory Commission (“NRC”) and Environmental Protection Agency (“EPA”), and the Oklahoma Department of Environmental Quality (“ODEQ”).

7. Pursuant to the ESA, Plaintiff was to complete its investigation and remediation of the Fansteel Site as required by the NRC, EPA and ODEQ and to pursue all potentially responsible parties (“PRPs”) under CERCLA for their share of Fansteel’s and Plaintiff’s response costs incurred and to be incurred to investigate and remediate the Fansteel Site. As relevant here, Section 113(f)(3)(B) provides:

A person that has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in [Section 113(f)(2)].

8. Plaintiff’s pursuit of contribution from PRPs based on its settlement is subject to a three-year statute of limitations from the date of “entry of a judicially approved settlement with respect to such costs.” 42 U.S.C. § 9613(f)(2). Such period thus expires June 2, 2023. *See id.*

9. As noted in prior Status Reports filed in the Underlying Case, Plaintiff previously furnished to the EPA documents that comprise its Vendor Documents that it compiled in order to respond to the EPA’s Request for Information pursuant to 42 U.S. Code § 9604(e) (the “EPA RFI”).

10. In addition to the EPA RFI-responsive Vendor Documents, the following additional records have been provided by Plaintiff to the EPA:

- a. Additional secondary and further supportive Vendor Documents not included in Plaintiff’s EPA RFI response;
- b. Copies of Plaintiff’s Chart of preliminary volumetric calculations for the Vendor Defendants’ residual waste materials (“RWM”) at the Fansteel Site, including its initial February 1, 2022 Chart, as well as its April 25, 2022

Updated Chart, its March 14, 2023 Second Updated Chart, and its further revised March 28, 2023 Second Updated Chart, which were updated and revised as described in greater detail below;

- c. Copy of preliminary volumetric RWM calculations spreadsheet for Citigroup (reflecting RWM based upon Philipp Brothers, Inc.'s purchase arrangements with Fansteel<sup>1</sup>), performed by Plaintiff's counsel in the Companion Action<sup>2</sup>; and
- d. A summary version of Plaintiff's updated Confidential Memorandum, to inform the EPA and DOJ about the private-party settlement structure options Plaintiff will be presenting to Citigroup and UCC once the RWM calculations are completed and reviewed and approved by EPA and its contractor.

11. As noted in Plaintiff's February 20, 2023 interim Status Report in the Underlying Case (Dkt. #200 in the Underling Case), since the Parties' Fifth Joint Status Report in the Underlying Case, there have been significant developments with respect to the Fansteel Site.

12. First, regarding the January 9, 2023 letter by J. Kevin Stitt, Governor of the State of Oklahoma, designating "the Fansteel Metals/FMRI site (OKD007221831) located in Muskogee, Oklahoma as the State of Oklahoma's highest priority facility under 42 U.S.C. § 9605(a)(8)(B) and 40 C.F.R. § 300.425(c)(2)," the following summarizes subsequent information furnished to Plaintiff:

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<sup>1</sup> In its Complaint, Plaintiff alleges that Citigroup is the successor to the environmental liabilities of Philipp Brothers, Inc. at the Fansteel Site.

<sup>2</sup> Preliminary volumetric calculations for Union Carbide's RWM at the Fansteel Site are currently being performed by Plaintiff's undersigned counsel in this case and will be shared with the EPA, UCC and Citigroup upon completion.

- a. On March 27, 2023, counsel for Plaintiff in this and the Underlying Case conferred via videoconference with the EPA, DOJ, ODEQ, and NRC regarding the Fansteel Site. During the discussion, the undersigned counsel for Plaintiff in this case was introduced. The discussion focused on the status of the EPA's anticipated procedure for listing the Fansteel Site on the National Priorities List ("NPL") under CERCLA, the status of the litigation in this and the Underlying Case, including service on Defendants in the Underling Case, and the status of anticipated RWM of the viable Defendants, the status of EPA's evaluation of Defendant Muskogee City-County Port Authority's liability in the Underlying Case, the work being performed by the EPA's contractor Toeroek and its consideration of Plaintiff's counsel's additional work performing additional preliminary RWM calculations (described below), and the EPA's anticipated procedure and schedule for making determinations and pursuing *de minimis* settlements, as follows:
- i. The EPA disclosed that it will be publishing in the Federal Register, its Proposed Rule for the Fansteel Site's listing on the NPL;
  - ii. The EPA disclosed that it is considering conducting another removal action at the Fansteel Site during the coming months, likely Summer of 2023;
  - iii. The EPA disclosed that it is in the process of developing a conceptual site model and data gap report for the Fansteel Site;
  - iv. The EPA disclosed that it may issue General Notice of Liability letters ("GNL") to some or all Vendor Defendants. GNLs advise recipients that they have been identified as potentially responsible parties under CERCLA and that they may be liable for CERCLA response costs.
- b. EPA issued a GNL to BHP Minerals Service Company f/k/a Billiton Trading Company, Inc. and f/k/a Billiton Metals, Inc., one of the Defendants in the

Underlying Case, on April 11, 2023;

- c. On March 29, 2023 EPA published in the *Federal Register* its Proposed Rule to amend the National Priorities List to include the Fansteel Site;
- d. The public comment period for the proposed NPL listing runs until May 30, 2023;
- e. ODEQ and EPA intend to host an open-house style community meeting in June 2023; and
- f. EPA considers all comments received during the public comment period. If, after EPA considers all comments received, it chooses to proceed with listing, the Fansteel Site will be listed on the NPL in a Final Rule published in the Federal Register in September 2023.

13. Second, regarding the EPA's engagement of contractor, Toeroek, Inc. and the discussions reflected in Plaintiff's interim Status Report in the Underlying Case (Dkt. # 200 in the Underlying Case), the following have since occurred:

- a. Counsel for Plaintiff in the Underlying Case performed additional preliminary calculations for the RWM of additional Vendor Defendants in the Underlying Case. The results of these calculations were incorporated into a March 14, 2023 and further revised March 28, 2023 Second Updated Preliminary RWM Calculations Chart, both of which were furnished to the EPA and Toeroek. During these discussions, counsel for EPA and Toeroek staff stated that Plaintiff's counsel's preliminary calculations for the most part were "pretty close" to those calculated by Toeroek;
- b. Counsel for Plaintiff in this case has performed additional preliminary

calculations for the RWM of Citigroup, based on the contractual arrangement between Philipp Brothers, Inc. and Fansteel, and is currently performing preliminary RWM calculations for UCC. Counsel's detailed preliminary calculations for the Citigroup/Philipp Brothers' RWM were furnished to the EPA and Toeroek on April 24, 2023 and have been produced to counsel for Citigroup and UCC in this case; and

- c. On April 4, 2023, counsel for Plaintiff in the Underlying Case conferred with EPA and Toeroek to answer any remaining questions before Toeroek's finalization of its report. During this discussion, Toeroek's work was discussed and only briefly shared in summary fashion. To date, EPA and Toeroek have declined to share Toeroek's final calculations or its determination of any percentage of total RWM volume at the Fansteel Site attributable to any specific Defendant, including Citigroup and UCC.

14. Counsel for Plaintiff in this case has informally provided all nexus documents used to perform RWM calculations for Citigroup and UCC to counsel for Citigroup and UCC in this case.

15. If requested by counsel for Citigroup and UCC, Plaintiff's counsel in this case will also informally provide nexus documents for Defendants in the underlying case, as well as publicly-available administrative records for the Fansteel Site.

16. Based upon the uncertainty regarding the timing for the EPA and DOJ to determine and implement *de minimis* settlements with eligible Defendants, just like in the Underlying Case, the Parties to this case seek a further extension of time to and including **September 1, 2023** for Citigroup and UCC to answer or file responsive pleadings to Plaintiff's

Complaint in this case.

17. The requested extension of time to and including **September 1, 2023** for Citigroup and UCC to answer or file responsive pleadings to Plaintiff's Complaint will continue to streamline and facilitate Plaintiff's Fed. R. Evid. 408 settlement discussions with Citigroup and UCC, allowing each Citigroup and UCC to focus their resources on the settlement track and in evaluating their respective liability and Plaintiff's proposed settlement options at the appropriate time when the EPA and DOJ are prepared to allow settlements that resolve Defendants' liability to the United States. The Parties believe such an extension of time saves judicial resources from having to monitor the status of each Defendant's compliance with its respective Fed. R. Civ. P. 6 or 12 deadlines and from having to address a cluttered docket that would certainly result if each of them was required to seek individualized and varied extensions of time during the pendency of their upcoming and ongoing settlement discussions with Plaintiff.

18. As with the Underlying Case, the Parties intend to update the Court regarding the status of this case and all settlement discussions prior to the expiration of the additional leave to grant further extensions being sought by Plaintiff, on or before **August 21, 2023**.

Dated: May 22, 2023

Respectfully submitted,

**THE JUSTIS LAW FIRM LLC**

/s/Gary D. Justis

Gary D. Justis E.D. Okla. ID 56723CO

P.O. Box 3408

201 Elk Ave., Unit B

Crested Butte, CO 81224

Telephone: (970) 248-8360

Facsimile: (970) 248-8386

Email: [gjustis@justislawfirm.com](mailto:gjustis@justislawfirm.com)

ATTORNEYS FOR PLAINTIFF FANSTEEL METALS, INC. F/K/A FMRI, INC.

**DOERNER, SAUNDERS, DANIEL & ANDERSON, LLP**

/s/ Michael S. Linscott

William C. Anderson, OBA #292

Linda C. Martin, OBA #5732

Michael S. Linscott, OBA #17266

Michael J. English, OBA #21502

2 West Second St. Ste. 700

Tulsa, OK 74103

Telephone: (918) 582-1211

[wanderson@dsda.com](mailto:wanderson@dsda.com)

[lmartin@dsda.com](mailto:lmartin@dsda.com)

[mlinscott@dsda.com](mailto:mlinscott@dsda.com)

ATTORNEYS FOR CITIGROUP, INC.

**RICHARDS & CONNOR, PLLP**

/s/Ethan M. Sneed

Ethan M. Sneed

12th Fl., ParkCentre Bldg.

525 South Main Street

Tulsa, OK 74103

T: (918) 585-2394

[esneed@richardsconnor.com](mailto:esneed@richardsconnor.com)

ATTORNEYS FOR UNION CARBIDE CORPORATION

**JOHNSON & BELL, LTD.**

/s/Garrett L. Boehm, Jr.

Garrett L. Boehm, Jr. (admitted pro hac vice)

Michael J. Linneman (admitted pro hac vice)

Daniel M. Yukich (admitted pro hac vice)

33 W. Monroe Street

Suite 2700

Chicago, Illinois 60603

(312) 372-0770

[boehmg@jbltd.com](mailto:boehmg@jbltd.com)

[linnemanm@jbltd.com](mailto:linnemanm@jbltd.com)

[yukichd@jbltd.com](mailto:yukichd@jbltd.com)

ATTORNEYS FOR UNION CARBIDE CORPORATION

**CERTIFICATE OF SERVICE**

I hereby certify that on May 22, 2023, a copy of the foregoing Second Joint Status Report was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access the filing through the Court's Electronic Case Filing System.

/s/ Gary D. Justis

Gary D. Justis